95-1743

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SYLVIA HILL, RAYMOND GRIFFIN, and EUGENE ROSS,

Petitioners,

v.

WAYLAND CLIFTON, JR.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court's decision, *Johnson v. Jones*, 115 S.Ct. 2151 (1995), permits immediate appellate review of a District Court's order denying a public official's motion for summary judgment based on qualified immunity, where the trial court finds "genuine issues of material fact" on the merits of a Plaintiff's constitutional tort claim?

PARTIES TO THE PROCEEDING

Petitioners, Sylvia Hill and Raymond Griffin, are residents of Gainesville, Alachua County, Florida. Petitioner, Eugene Ross, is a resident of Ocala, Marion County, Florida. Petitioners were Plaintiffs in the United States District Court proceedings and were the Appellees before the United States Court of Appeals for the Eleventh Circuit.

Respondent, Wayland Clifton, Jr., is a resident of Gainesville, Alachua County, Florida. He was a Defendant in the United States District Court proceedings and was the Appellant before the United States Court of Appeals for the Eleventh Circuit.

There are no other parties to this action.

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OPINION AND ORDERS BELOW

The published opinion of the United States Court of Appeals for the Eleventh Circuit reversing the judgment of the District Court is reported at 74 F.3d 1087 (11th Cir. Jan. 26, 1996). *Pet. App. pp.* 1a-12a.[1]

The unpublished orders of the United States District Court for the Northern District of Florida, Gainesville Division, denying Respondent's Motion(s) for Summary Judgment based on qualified immunity are not reported, but are contained as part of the appendix. *Pet. App. pp.* 13a-46a.

STATEMENT OF JURISDICTION

On January 26, 1996, the United States Court of Appeals for the Eleventh Circuit entered judgment with a published opinion following oral argument, reversing the district court's denial of Respondent's Motion(s) for Summary Judgment based on qualified immunity. The court of appeals vacated the district court's order(s) and remanded the case(s) with instructions to enter summary judgment based on qualified immunity. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] References to the Opinion and Orders below, which comprise the Appendix to this petition, will be made with the abbreviation *Pet. App. p.* ___.

STATUTE

28 U.S.C. § 1291, Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in § 1292(c) and (d) and § 1295 of this title.

STATEMENT OF THE CASE

Sylvia Hill, Raymond Griffin, and Eugene Ross were employed in the Internal Affairs Division of the Gainesville Police Department at all relevant times. *Pet. App. p.* 3a. Sylvia Hill was the Internal Affairs Unit Commander, Ross was Hill's immediate supervisor and held the rank of Inspector, and Ray Griffin reported to Hill. *Pet. App. pp.* 3a, 38a. In 1991, Petitioners brought claims under 42 U.S.C. § 1983 against Gainesville Police Chief Wayland Clifton, and the City of Gainesville, Florida. *Pet. App. pp.* 22a, 38a. Hill's Complaint alleged the constitutional torts of gender discrimination and a First Amendment claim involving grand jury testimony. *Pet. App. pp.* 24a, 25a. Ross' and Griffin's claims were based on the same operative facts as those giving rise to Hill's First Amendment

Claim, following Petitioners' contact with the grand jury. *Pet. App. pp.* 22a, 38a.

At some point during their tenures with Internal Affairs, Petitioners began a secret investigation of a group know as "Hallucinations 2000", and developed information suggesting Clifton was involved. *Pet. App. p.* 3a. The Petitioners believed that "Hallucinations 2000" improperly controlled promotions and transfers within the Gainesville Police Department. *Pet. App. p.* 3a.

Inspector Eugene Ross submitted the information on "Hallucinations 2000" to City Manager Paul White. *Pet. App. p.* 3a. After Inspector Ross advised City Manager White of Petitioners' suspicions, Respondent Clifton informed Petitioners that they were locked-out of Internal Affairs. *Pet. App. p.* 4a. Clifton explained that he had authorized an audit/inspection of the Internal Affairs Division at Gainesville Police Department and as a result, Petitioners were transferred. *Pet. App. pp.* 3a, 39a. Hill, Griffin and Ross believe that the audit/inspection-explanation for the lock-out was merely a pretext for determining who had participated in the inquiry over "Hallucinations 2000." *Pet. App. pp.* 23a, 39a. Following the lock-out, Petitioners began discussing their situation with Larry Turner, a Gainesville attorney. *Pet. App. pp.* 24a, 39a. Specifically, Petitioners questioned whether they should approach the grand jury to testify concerning alleged wrongdoings by "Hallucinations 2000" and concerning Chief Clifton's involvement with this organization. *Pet. App. pp.* 24a, 39a. Ultimately, Hill, Griffin and Ross contacted the grand jury concerning their suspicions and the suspected involvement of Chief Clifton. *Pet. App. pp.* 24a, 39a.

Shortly thereafter, Petitioners received notice that the entire Internal Affairs Division at the Gainesville Police

Department was being investigated. *Pet. App. pp.* 24a, 39a. As a result of the investigation, Hill and Griffin were demoted. *Pet. App. pp.* 24a, 25a. The reasons given for the demotions were poor work performance and employee misconduct for Hill and Griffin, respectively. *Pet. App. pp.* 24a, 25a. Fearing reprisals against himself and other members of Internal Affairs, Inspector Eugene Ross retired from the Gainesville Police Department on September 1, 1991. *Pet. App. p.* 39a. Petitioners alleged that the demotions and forced retirement formed the bases for 42 U.S.C. § 1983 First Amendment retaliation claims. *Pet. App. pp.* 24a, 25a, 39a.

Following two years of discovery, Respondent Clifton moved for summary judgment based on qualified immunity. *Pet. App. pp.* 13a, 14a. Respondent Clifton's Motions were denied. *Pet. App. pp.* 37a, 46a. Clifton immediately appealed the lower court's denial of his motions for summary judgment based on qualified immunity, invoking the jurisdiction of the court of appeals as an exception to 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

After the briefs were submitted to the Eleventh Circuit Court of Appeals, this Court decided *Johnson v. Jones*, 115 S.Ct. 2151 (1995). The jurisdiction question resolved by *Johnson v. Jones* was raised via Fed.R.App.P. 28(j), and again at oral argument.

The United States District Court's Orders concerning Clifton's Motion(s) for Summary Judgment reflect the District Court's analysis for a 42 U.S.C. § 1983 First Amendment retaliation claim and the qualified immunity defense. In concluding its analysis, the Court states,

> Certain factors justify concluding that this speech was motivated by public, rather than

> purely personal, concerns. First, they [petitioners] attempted to make these statements public, although this would not have resulted in any direct benefit to them. While Hill's gender discrimination grievance, if granted, could have resulted in her gaining a captaincy, the grand jury proceedings would not have conferred any direct benefit to her. Second, the public's potential interest in the matter discussed should be considered. It is true that the public's potential interest in the matter is relevant to the employee-motivation issue only as it tends to show that the employee was indeed motivated by public concern. However, here the potential public interest in allegations of a corrupt clique controlling the police department contributes to the reasonableness of concluding that the Plaintiffs were motivated by the public interest when contacting the grand jury. Therefore, this Court finds that, in the context of the entire record, the Plaintiffs were motivated by public concerns when they contacted the grand jury. Thus, Plaintiffs have met the first prong of the four-part test. *Pet. App. pp.* 31a, 45a.

After concluding that the Plaintiffs' interests in exposing corruption at the local police department outweighed government interests, the court concluded, that regarding remaining issues, " . . . the plaintiffs have provided sufficient factual assertions to raise a genuine issue of material fact with respect to them. Thus, Clifton's Motion for Summary Judgment is denied." *Pet. App. pp.* 32a, 46a. Clifton immediately appealed the District Court's orders, invoking the court of appeals' jurisdiction as an exception to 28 U.S.C. § 1291. *Pet. App. p.* 3a.

REASON FOR GRANTING THE WRIT

I. This Court's decision, *Johnson v. Jones*, 115 S.Ct. 2151 (1995), precludes immediate appellate review of a District Court's order denying a public official's motion for summary judgment based on qualified immunity, where the trial court finds "genuine issues of material fact" on the merits of a Plaintiff's constitutional tort claim.

The United States Court of Appeals for the Eleventh Circuit accepted jurisdiction of Clifton's appeal of the District Court's Orders denying his Motion(s) for Summary Judgment on the qualified immunity defense in derogation of this Court's ruling in *Johnson v. Jones*, 115 S.Ct. 2151 (1995). In *Johnson v. Jones*, this Court stated, "For these reasons, we hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a District Court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine issue of fact' for trial." *Id.* at 2159. Following *Johnson v. Jones*, a District Court's rejection of the public official's qualified immunity defense remains immediately appealable to the extent it turns on purely legal questions. *Id.* at 2858; *Mitchell v. Forsyth*, 472 U.S. 511 at 530 (1985). When the court of appeals reversed the district court's rulings in the instant case, with instructions to enter summary judgment in favor of Respondent Clifton based on the qualified immunity defense, the Eleventh Circuit acted contrary to this Court's holding in *Johnson v. Jones*. Since the District Court found genuine issues of fact for trial, *Johnson v. Jones* precluded immediate appellate review. *Id.* at 2159.

In *Johnson v. Jones*, the order at issue resolved a fact dispute about the pretrial record, specifically that there remained genuine issues of fact for trial. *Id.* at 2153. Concerning a trial court's fact-based determinations and the policies which underlie the qualified immunity defense, this Court stated,

> Many constitutional tort cases, unlike the simple "we didn't do it" case before us, involved factual controversies about, for example, intent-controversies, that before trial, may seem nebulous. To resolve those controversies – to determine whether there is or is not a triable issue of fact about such a matter – may require reading a vast pretrial record, with numerous conflicting affidavits, depositions and other discovery materials. *Id.* at 2858.

Therefore, to the extent a public official's qualified immunity defense turns on the merits of a constitutional tort claimant's case, trial court rulings on such issues are not immediately appealable as an exception to 28 U.S.C. § 1291. *Id.*

The law concerning the First Amendment rights of public employees is well-settled. For over twenty-five years, the United States Supreme Court decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), has stood for the proposition that government employees may not be constitutionally compelled to relinquish First Amendment rights that they would otherwise enjoy as citizens in exchange for public employment. *Id.* at 568.

In *Pickering*, a school teacher was dismissed under an Illinois law following a letter sent to a local newspaper editor which criticized the way in which the school board and school district superintendent handled tax proposals.

Id. at 564-5. The Court held absent proof of false statements knowingly or recklessly made, the teacher's exercise of his right to speak on issues of public importance may not furnish the basis for dismissal from public employment. *Id.* at 574. Stated succinctly, "A public employer may not discharge an employee on a basis that infringes upon that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378 at 383 (1987) (citation omitted).

Pickering is well known for having spawned the so-called *Pickering* balancing test outlining the elements of a plaintiff's § 1983 First Amendment retaliation claim: 1) a threshold determination is whether the allegedly regulated speech is a matter of public concern; 2) Courts must then balance the First Amendment freedoms of public employees against the legitimate needs and policies associated with unimpeded government function; 3) assuming parts 1 and 2 are satisfied, the fact-finder determines whether the content of the speech at issue was a substantial factor in the action taken by the government employer; and 4) the state is then entitled to put on evidence that the action taken allegedly as a result of the public employee's speech would have resulted anyway. *Bryson v. City of Waycross*, 888 F.2d 1562 at 1565-1566 (11th Cir. 1989).

Following two years of discovery, Respondent Clifton moved for summary judgment asserting the qualified immunity defense. However, instead of framing his motion based on the simple legal question of whether the law concerning a public employee's free speech rights was clearly established at the time Petitioners' claims

arose, Respondent's counsel fashioned a motion for summary judgment based on the merits of Petitioners' First Amendment claims. As the District Court's orders reflect, the trial court engaged in a lengthy factual analysis to conclude that Respondent Clifton's Motion for Summary Judgment based on qualified immunity must be denied. *Pet. App. pp.* 32a, 46a.

In *Johnson v. Jones* this court clarified the various approaches of the courts of appeals concerning the immediate appealability of a pretrial "evidence insufficiency" claim made by a public official defendant asserting the qualified immunity defense. *Johnson* at 2154. Three principles guided the Court in reaching its decision. First, the Court felt constrained by *Mitchell v. Forsyth*, 472 U.S. 511 that the qualified immunity appeal exception to 28 U.S.C. § 1291 was limited to a purely legal question: whether the facts alleged by claimants support a claim of violation of "clearly established law." *Mitchell* was based on the view that a claim of immunity is conceptually distinct from the merits of a plaintiff's claim. 472 U.S. at 527; *Johnson* at 2156. The principle of separability insures that decisions regarding the merits of a claimant's case are not immediately appealable. However, the Eleventh Circuit Court of Appeals opinion contains considerable factual analysis on the qualified immunity defense issue. *Pet. App. pp.* 8a-9a.

Second, this court, in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949) held that certain "collateral orders" met the finality criteria of 28 U.S.C. § 1291, recognizing that some issues are too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until

the entire case is adjudicated. *Id.* at 546. However, in this case, Respondent's motions for summary judgment were based on the merits of Plaintiff's First Amendment cause of action and thus fail to satisfy the independence requirement for immediate appealability.

The third principle guiding the *Johnson* court arose from policy concerns related to the final judgment rule. After a careful review of the competing considerations underlying questions of finality, this Court concluded that qualified immunity appeals interfere less with the final judgment rule if they are limited to cases presenting abstract questions of law. *Johnson* at 2858 (citation omitted). A review of the appellate court's opinion below, however, reflects that the Eleventh Circuit Court of Appeals engaged in a lengthy factual analysis of the record from the trial court, ultimately reversing the district court's decision and denying Petitioners their day in court.

A review of the Eleventh Circuit's analysis of *Johnson v. Jones* reveals the court of appeals' error. Concerning appellate jurisdiction following *Johnson v. Jones*, the Eleventh Circuit states,

> It seems clear to us that the Supreme Court was not changing the well-established law of qualified immunity in the context of summary judgment, just elaborating on it. When faced with a Motion for Summary Judgment based on qualified immunity, the District Court must determine whether there is a genuine issue of material fact as to whether the defendant committed conduct that violated clearly established law. This analysis can be broken down into two parts. First, what was the official's conduct,

> based on the pleadings, depositions and affidavits, when viewed in the light most favorable to the nonmoving party? Second, could a reasonable public official have believed that such conduct was lawful based on clearly established law? *Pet. App. p.* 6a.

In spite of *Johnson v. Jones*, the Eleventh Circuit continues,

> The resolution of the second issue constitutes a final, collateral order. (citing *Mitchell*). A ruling on such an issue is immediately appealable. (citing *Mitchell*). When such a ruling is appealable, the first issue – the factual issue – may be addressed by an appellate court because it is a part of the core qualified immunity analysis.

Pet. App. pp. 6a-7a.

The opinion below reflects the Eleventh Circuit's lengthy factual analysis of Respondent's Motion for Summary Judgment based on qualified immunity, focusing on the merits of Petitioners' claims and not abstract issues of First Amendment law. Under *Johnson v. Jones*, the Eleventh Circuit Court of Appeals lacked jurisdiction to hear the instant case, and the appeal should have been dismissed for lack of jurisdiction and the case remanded to the District Court for trial.

In reversing the District Court's denial of Respondent's Motion for Summary Judgment based on qualified immunity, the Eleventh Circuit Court of Appeals made the following findings of fact: 1) While the Plaintiffs were still in Internal Affairs, Clifton told Hill that he was not happy with some of the work product coming out of Internal Affairs; 2) Clifton transferred the Plaintiffs out of

Internal Affairs prior to the point at which they testified before the grand jury; 3) Clifton, in consultation with City Manager White ordered an audit of Internal Affairs prior to the Plaintiffs testifying before the grand jury; 4) The Plaintiffs knew they were being investigated; 5) The Plaintiffs went to the grand jury after they knew they were being investigated; and 6) The Plaintiffs would likely be in a better employment position if the grand jury indicted Clifton. *Pet. App. pp.* 8a-9a. Thus, the Eleventh Circuit Court of Appeals not only improvidently accepted jurisdiction over the instant case, but it engaged in a lengthy fact-finding process, inconsistent with that of the District Court, and beyond the scope of permissible appellate review of a public official's motion for summary judgment based on qualified immunity.

After a review of the lengthy record compiled in this case following two years of discovery, the District Court stated, "Certain factors justified concluding that this speech was motivated by public, rather than purely personal concerns." *Pet. App. pp.* 31a, 45a. The District Court's analysis continues, noting the Petitioners, " . . . attempted to make these statements public, although this would not have resulted in any direct benefit to them." *Pet. App. pp.* 31a, 45a. The District Court further found that the potential public interest in allegations of police corruption, " . . . contributes to the reasonableness of concluding that the Plaintiffs were motivated by the public interest when they contacted the grand jury." *Pet. App. pp.* 31a, 45a. Concluding its analysis, the District Court stated, "In the context of the entire record, the Plaintiffs were motivated by public concern when they contacted the grand jury." *Pet. App. pp.* 31a, 45a.

The language of the District Court's order is clear that Respondent's Motion for Summary Judgment based on qualified immunity was a fact-based determination and not immediately appealable as an exception to 28 U.S.C. § 1291. The court of appeals necessarily engaged a review of the record in this case to assess the District Court's holding concerning issues of facts on the merits of Petitioners' constitutional tort claims. The District Court's orders reflect analysis and conclusions not separate from the merits of Petitioners' claims, but rather analysis and conclusions which are based on the merits of Petitioners' constitutional tort claims. Thus, under *Johnson v. Jones*, the Eleventh Circuit Court of Appeals lacked jurisdiction over the instant case and the appeal should have been dismissed.

The District Court's orders on Respondent's Motion(s) for Summary Judgment found further issues of material fact with respect to, " . . . whether the speech was a substantial motivating factor in their demotion and whether the government would have reached the same decision in the absence of the protected speech. . . . " *Pet. App. pp.* 32a, 46a. Such a fact-based finding exceeds the limit on the jurisdiction exception to 28 U.S.C. § 1291. See also *Rivera v. Senkowski*, 62 F.3d 90 (2d Cir. 1995) (cannot review District Court's determination of a genuine issue of material fact as to whether or not action would have been taken against Plaintiff in absence of improper reason.); *Stella v. Kelly*, 63 F.3d 71 (1st Cir. 1995) (cannot review District Court's findings of genuine issue of material fact as to the second prong of the *Mount Healthy* paradigm); *Kincade v. City of Blue Springs, MO*, 64 F.2d 389 (8th Cir. 1995) (whether or not exercise of First Amendment rights caused termination is not "inextricably intertwined" with the qualified immunity claims, thus

appellate jurisdiction does not exist as to that question in light of *Johnson v. Jones*).

In reversing the District Court's denial of Respondent's Motion for Summary Judgment based on qualified immunity, the Eleventh Circuit opined, "We know of no case which might have clearly told Clifton that he could not take the disciplinary action indicated by the investigation which was initiated before he even knew about the allegedly protected speech, and in circumstances where the public concern implication was doubtful. Thus, we conclude that Clifton is entitled to qualified immunity." *Pet. App. p.* 11a. The appellate court's conclusion ignores the District Court's determination, concerning the purely legal issues surrounding qualified immunity in the context of a First Amendment claim, "It is clear beyond cavil that a government employer cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." (citing *Connick v. Myers*, 461 U.S. 138 (1983)). *Pet. App. pp.* 26a, 40a.

Concerning the purely legal question of qualified immunity in a First Amendment claim context, the District Court held that the law announced in *Pickering v. Board of Education* was clearly established, i.e., Clifton could not condition Petitioners' public employment in a way that infringed on their protected speech. *Pet. App. pp.* 26a, 40a. The Eleventh Circuit Court of Appeals analysis is fact-based, is focused on the District Court's order concerning the merits of Petitioner's tort claims, and thus the Eleventh Circuit lacked jurisdiction over the instant appeal. *Johnson v. Jones* at 2158-9 The appeal should have been dismissed and this case remanded to the United

States District Court for the Northern District of Florida, Gainesville Division for trial consistent with the District Court's orders entered herein.

The Eleventh Circuit's holding in this case conflicts with virtually every court of appeals' interpretation of *Johnson v. Jones*. See also *Carnell v. Grimm, et al.*, 74 F.3d 977 (9th Cir. 1995); *Armendariz, et al. v. Penman, et al.*, 75 F.2d 1311 (9th Cir. 1996); *Carter v. State of Rhode Island*, 68 F.3d 9 (1st Cir. 1995); *Buonocore v. Harris, et al.*, 65 F.3d 347 (4th Cir. 1995); *Rambo v. Daley*, 68 F.3d 203 (7th Cir. 1995); *Miller v. Schoenen*, 75 F.3d 1305 (8th Cir. 1996); *Winfield v. Bass*, 67 F.3d 529 (4th Cir. 1995); *Rodriguez v. Phillips*, 66 F.3d 470 (2d Cir. 1995). Each case cited above followed this Court's decision in *Johnson v. Jones* to limit the court of appeals' jurisdiction to hear interlocutory appeals of fact-based orders.

Johnson v. Jones announces a jurisdictional rule, a limited exception to 28 U.S.C. § 1291. In accepting jurisdiction of this case, the Eleventh Circuit fashioned a new approach under *Johnson* whereby an appellate court may review factual determinations which are "inextricably intertwined" with the legal underpinnings of qualified immunity analysis. *Pet. App. p.* 7a. (Relying upon *Swint v. Chambers County Commission*, 115 S.Ct. 1203, at 1209 (1995), to accept jurisdiction of fact-based orders on qualified immunity based on the appellate court's "pendent" jurisdiction.). The decision creates a gray area regarding the jurisdiction of appellate courts to review trial court orders denying summary judgment based on qualified immunity. Therefore, this case warrants consideration by this Court to address the Eleventh Circuit's departure

from the jurisdictional principles announced in *Johnson v. Jones.*

As the First Circuit Court of Appeals aptly stated in *Carter v. State of Rhode Island,* 68 F.3d 9 (1995),

> *Johnson* announces a jurisdictional rule – signaling a new day in the First Circuit, (citation omitted) – and not one to be undone by recasting fact-based rulings denying summary judgment on qualified immunity defenses into law-based "collateral orders" immediately appealable under *Cohen v. Beneficial Industrial Loan Corporation.* 337 U.S. 541 (1949). See *Elliot v. Thomas,* 937 F.2d 338, at 341 (7th Cir. 1991) ("By sleight of hand [defendants] can turn any defense on the merits into a defense of qualified immunity."), *cert. denied,* 502 U.S. 1121 (1992). The *Johnson* rule would be undermined – its important aims frustrated, see e.g., *Johnson,* 115 S.Ct. at 2158 (noting, *inter alia* 'danger of denying justice by delay') – were defendant officials, spurred by the prospect of delay and the leverage it occasions, permitted to contrive insubstantial "issues of law" as grounds for interlocutory review. *Id.* at 13-14.

This Honorable Court should grant discretionary review to clarify the jurisdictional principles announced in *Johnson v. Jones.*

CONCLUSION

Based on the foregoing reasons, the Petitioners, Sylvia Hill, Raymond Griffin, and Eugene Ross, respectfully request that this Honorable Court direct a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1995

SYLVIA HILL, RAYMOND GRIFFIN,
and EUGENE ROSS,

Petitioners,

v.

WAYLAND CLIFTON, JR.,

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CONSOLIDATED

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3179

D.C. No. 91-10121-MMP

GEORGE JOHNSON,

Plaintiff,

SYLVIA HILL, RAYMOND GRIFFIN,

Plaintiffs-Appellees,

versus

WAYLAND CLIFTON,

Defendant-Appellant,

CITY OF GAINESVILLE,

Defendant.

No. 94-3180

D.C. No. 91-10145-MMP

EUGENE ROSS,

Plaintiff-Appellee,

versus

WAYLAND CLIFTON,

Defendant-Appellant,

CITY OF GAINESVILLE,

Defendant,

GEORGE JOHNSON,

Respondent,

No. 94-3184

D.C. No. 91-10118-MMP

SYLVIA HILL,

Plaintiff-Appellee,

versus

WAYLAND CLIFTON, individually and as the Chief of Police and agent for the City of Gainesville,

Defendant-Appellant,

CITY OF GAINESVILLE,

Defendant.

Appeals from the United States District Court for the Northern District of Florida

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(January 26, 1996)

Before ANDERSON and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

FAY, Senior Circuit Judge:

This appeal arises from the District Court's denial of qualified immunity and denial of summary judgment to Wayland Clifton, Jr., the police Chief for the City of Gainesville. Three former police officers, Sylvia Hill, Eugene Ross, and Raymond Griffin, brought suit against Clifton, alleging that they were disciplined for testifying about Clifton before a grand jury. Because Clifton is entitled to qualified immunity, we reverse.

I. BACKGROUND

Hill, Ross, and Griffin worked together in Internal Affairs at the Gainesville Police Department. Hill was the Unit Commander; Ross was Hill's immediate supervisor, while Griffin reported to Hill. Hill, Ross, and Griffin allege that Internal Affairs began an investigation of alleged misconduct by a group within the police department called Hallucinations 2000, and gave proper notice to the City Manager that Clifton might be involved; in response to this investigation, Clifton transferred the plaintiffs from Internal Affairs; after an audit of Internal Affairs revealed no wrongdoing, Clifton stated that the investigation was concluded and nothing would come of it; Clifton offered to transfer the plaintiffs to any position within the department that they desired; State Attorney Len Register then contacted Hill and asked who he should subpoena to enable the grand jury to make a decision as to whether the police department should be investigated regarding Hallucinations 2000; the plaintiffs testified before the grand jury regarding Hallucinations 2000; in retaliation for the grand jury testimony, Clifton re-opened the investigation into Internal Affairs and then disciplined the plaintiffs.

Clifton denies that he retaliated against the plaintiffs for their testimony before the grand jury. He claims that the plaintiffs initiated a secret investigation without notifying the City Manager; that he was not involved in any way with Hallucinations 2000 and that the group turned out to be innocuous in any event; that the grand jury and the independent investigator concluded that he had done nothing wrong; that an audit of Internal Affairs showed that investigative files were missing, some cases had not

been completed, some investigations were untimely or unauthorized, and certain direct orders had been ignored; that in response to that misconduct he disciplined the plaintiffs; and that the plaintiffs had only gone to the grand jury in order to gain leverage over him and prevent the deserved discipline rather than out of any public concern about possible corruption.

It is undisputed that Hill was told in April of 1991, prior to any allegations or investigation concerning Hallucinations 2000, that she would be transferred from Internal Affairs; that in early April she was transferred; that in early April Ross and Griffin were "locked out" of Internal Affairs so that an audit could be conducted; that the audit was concluded in June; that in July Clifton offered to transfer Hill to any position within the police department (except Internal Affairs) if that was the end of the matter; that the plaintiffs went to the grand jury anyway; that after the plaintiffs went to the grand jury, the audit findings were reviewed and misconduct charges were filed.

Hill, Ross, and Griffin brought suit against Clifton and the City of Gainesville. The District Court granted summary judgment to the City on all charges, but denied Clifton's motion for summary judgment based on qualified immunity. Clifton immediately appealed the denial of qualified immunity.

II. STANDARD OF REVIEW

We review *de novo* a District Court's ruling that a public official's conduct violated clearly established law

so that the official is not entitled to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986). The evidence must be viewed in the light most favorable to the non-moving party. *Augusta Iron and Steel Works, Inc. v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988).

III. ANALYSIS

A. Jurisdiction: *Johnson v. Jones*

Public officials are entitled to qualified immunity from "liability for civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A public official may immediately appeal a denial of qualified immunity where the disputed issue involves whether or not the defendant's conduct constitutes a violation of clearly established law. *Mitchell*, 472 U.S. at 528. The public official may appeal such a decision because it is considered a final, collateral order regarding qualified immunity. *Id.* at 528.

In *Johnson v. Jones*, 115 S.Ct. 2152 (1995), the Supreme Court further addressed the law of summary judgment in the context of qualified immunity. The issue in *Johnson* was whether there was any evidence in the record to support the District Court's ruling that a reasonable fact

finder could find that the public officials were involved in the plaintiff's beating.[1] *Id.* at 2153-54. The defendants admitted that such a beating was unconstitutional and violated clearly established law; they only argued that the District Court had erred when it found a genuine issue of material fact in regard to their involvement in the unconstitutional conduct. *Id.* 2154. The Supreme Court held that such a ruling by the District Court could not be appealed as a final, collateral order. *Id.* at 2156-58.

It seems clear to us that the Supreme Court was not changing the well-established law of qualified immunity in the context of summary judgment, just elaborating on it. When faced with a motion for summary judgment based on qualified immunity, the District Court must determine whether there is a genuine issue of material fact as to whether the defendant committed conduct that violated clearly established law. This analysis can be broken down into two parts. First, what was the official's conduct, based on the pleadings, depositions, and affidavits, when viewed in the light most favorable to the non-moving party? Second, could a reasonable public official have believed that such conduct was lawful based on clearly established law?

The resolution of the second issue constitutes a final, collateral order. *Mitchell* at 528. A ruling on such an issue is immediately appealable. *Id.* When such a ruling is appealable, the first issue – the factual issue – may be addressed by an appellate court because it is a part of the

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[1] Or phrased another way, whether there was enough evidence to create a genuine issue of material fact as to whether the public officials were involved in the beating.

core qualified immunity analysis. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987). However, if only the first issue is appealed, namely what conduct the defendant engaged in based on the evidence viewed in the light most favorable to the plaintiff, *and not* the second issue, namely whether that conduct violated clearly established law, then the appellate court has no jurisdiction to hear the case. *See Johnson*, 115 S.Ct. at 2159. The first issue – the factual issue – can only be heard because it is a necessary part of the core qualified immunity analysis, the resolution of which constitutes a final, collateral order; when the core qualified immunity issue is not appealed, then the factual issue may not be either. *Id.*

When the core qualified immunity issue is raised on appeal, the appellate court has two options regarding how to deal with the factual issue. "When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id.* at 2159. Or, the court of appeals can conduct its own review of the record in the light most favorable to the nonmoving party. First, the appellate court may have to do so because the trial court failed to state the facts it assumed. *Id.* Second, the appellate court can do so because such a determination is part of the core qualified immunity analysis, as discussed above. *See Anderson*, 483 U.S. at 641. Third, even if such a determination were not part of the core qualified immunity analysis, it would be "inextricably intertwined" with that analysis and within the appellate court's pendent jurisdiction. *Swint v. Chambers*, 115 S.Ct. 1203, 1209 (1995). *See also Johnson*, 115 S.Ct.

at 2159. Of course, if there is any evidence in the record to support the District Court's ruling that there was a genuine issue of material fact as to whether the official actually engaged in the conduct that violated clearly established law, the District Court's factual ruling will not be disturbed. *See Celotex*, 477 U.S. at 322.

B. Qualified Immunity

In the qualified immunity context, the plaintiffs have the burden of proving that a reasonable public official would not have believed that his actions were lawful, in light of clearly established law. *Anderson*, 483 U.S. at 641. Clifton argues both that the District Court wrongly applied the clearly established law to the facts it found and that the record does not support some of the facts the District Court found, even when viewed in the light most favorable to the plaintiffs.

1. The Factual Issue

Even when viewing the record in the light most favorable to the plaintiffs, there is no genuine dispute regarding the following material facts: 1) while the plaintiffs were still in Internal Affairs, Clifton told Hill that he was not happy with some of the work product coming out of Internal Affairs; 2) Clifton transferred the plaintiffs out of Internal Affairs prior to the point at which they testified before the grand jury; 3) Clifton, in consultation with City Manager White, ordered an audit of Internal Affairs prior to the plaintiffs testifying before the grand jury; 4) the plaintiffs knew they were being investigated;

5) the plaintiffs went to the grand jury after they knew they were being investigated; 6) the plaintiffs would likely be in a better employment position if the grand jury indicted Clifton.[2]

2. Clearly Established Law

A government employer may not retaliate against a public employee for engaging in protected speech. *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). Where the public employer denies that the employee was disciplined in violation of that employee's first amendment rights, the court engages in a four-stage analysis: 1) the employee's speech must involve a matter of public concern in order for it to be protected, 2) the employee's first amendment interests must outweigh the public employer's interest in efficiency (the *Pickering*[3] balancing test), 3) the employee must have been disciplined, in substantial part, because of the protected speech, and 4) the public employer must not be able to prove by a preponderance of the evidence that it would have disciplined the employee even without the protected speech. *Bryson*, 888 F.2d at 1565-66.

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[2] It is true that Clifton had offered at least Hill the chance to be transferred anywhere she wanted other than Internal Affairs. However, Hill wanted to be transferred back into Internal Affairs, and neither she nor the other plaintiffs reached any agreement with Clifton. The only chance for the plaintiffs to receive what they wanted, then, was through a grand jury indictment or report.

[3] *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Whether a statement involves a matter of public concern is a question of law for the judge, who must consider the purpose of the employee's speech by analyzing "the content, form, and context" of the statement. *Id. See also Ferrara*, 781 F.2d 1508, 1513 (11th Cir. 1986). If the relevant speech was motivated by personal concerns instead of public concerns then it is not protected by the First Amendment in this context. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). The issue here is not whether the employee is entitled to make the statement, but rather whether the employee is entitled to retain employment and avoid discipline after making the statement. The Supreme Court has decided that only statements motivated by public concern deserve such protection because otherwise every criticism of a public official and every employment dispute would "plant the seed of a constitutional case." *Id.* at 149. "[G]overnment officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.

Furthermore, even if the employee's speech touches upon a matter of public concern, a *Pickering* balancing must be conducted to determine whether the government office was justified in discharging the employee. *Connick*, 461 U.S. at 149. A public official is entitled to qualified immunity, except in "the extraordinary case where the *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989).

In *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), an employee was fired after complaining about sexual

harassment. This Court concluded that her statement regarding sexual harassment did not involve a matter of public concern because, even though sexual harassment is a matter of "important social interest," the purpose of the statement was not to raise issues of public concern, but rather to further her own "entirely rational self-interest." *Id.* at 755.

In the instant case, possible police corruption is obviously a matter of important social interest; however, in this qualified immunity context, we must focus on what Clifton knew. Even when viewing the evidence in the light most favorable to the plaintiffs, it is clear that Clifton knew the plaintiffs went to the grand jury after they knew they were being investigated, and hoped to gain from a grand jury indictment or report. It is obvious to us that Clifton viewed their actions as intended to put pressure on him to prevent him from following through with the investigation which had already commenced and which led to the ultimate discipline. In light of the information available to Clifton, we cannot conclude that clearly established law told him that the plaintiffs' grand jury testimony was a matter of public concern rather than personal gain. We know of no case which might have clearly told Clifton that he could not take the disciplinary action indicated by an investigation which was initiated before he even knew about the allegedly protected speech, and in circumstances where the public concern implication was doubtful. Thus, we conclude that Clifton is entitled to qualified immunity.

IV. CONCLUSION

Applying the analysis required by Supreme Court precedent, we conclude that Clifton's conduct did not violate clearly established law and so he is entitled to the protection provided by qualified immunity. We vacate the order of the District Court and remand with instructions that summary judgment be entered in favor of the appellant.

VACATED and REMANDED with instructions.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GEORGE JOHNSON 91-10117,
SYLVIA HILL 91-10118,
RAYMOND GRIFFIN 91-10121,
and EUGENE ROSS 91-10145,

Plaintiffs,

v.

WAYLAND CLIFTON, and THE CITY OF GAINESVILLE,

Defendants.

_____/

CASE NO.
[SEE ABOVE]

(Filed Aug. 23, 1994)

ORDER

Oral argument was held on all pending motions in all of the cases on August 19, 1994. Three categories of motions were before the court.

First, in all cases, the City of Gainesville has moved for summary judgment. The city argues that it cannot be held liable under 42 U.S.C. § 1983 for the conduct of Chief Clifton, because Chief Clifton did not possess final policymaking authority. Thus the conduct of Clifton was not pursuant to a policy, custom or usage of the City of Gainesville.

Second, in the *Johnson* case, both defendants sought reconsideration of part of the June 24, 1993, order entered in that case. In that order, the court denied many of Johnson's claims but let survive Johnson's First Amendment claim. The defendants assert that the court was not

shown the entire factual record before ruling that Johnson's statements involved matters of public concern.

Third, in the *Hill* and *Griffin* cases, Chief Clifton filed motions for summary judgment asserting qualified immunity. The motion filed in the Sylvia Hill case carries the case style from each case. The motion in the *Griffin* case is styled only for that case. The three categories of motions are discussed, in turn, below.

I. THE CITY OF GAINESVILLE'S MOTION FOR SUMMARY JUDGMENT . . . (FILED IN ALL CASES)

A. Introduction

In each of the cases, the City of Gainesville filed a motion to dismiss or for summary judgment. The city's argument was that Wayland Clifton did not possess final policymaking authority with regard to personnel matters within the police department. Thus, the municipality could not be held liable for his actions.

The City's motions to dismiss were pending on June 24, 1993, when an order was entered in the *Johnson* case, 91-10117. That order dismissed 10 out of 12 of Johnson's claims, but deferred ruling on the City's argument concerning Clifton's policymaking authority. Instead, this court directed the parties to brief whether Clifton possessed final policymaking authority.

Instead of merely briefing the policymaking authority of Clifton, however, the plaintiffs in the various cases sought to shift the focus of the case to include Paul White, the city manager of Gainesville. The plaintiffs filed motions to amend their complaints and to add Paul White

as an indispensable party. The theory was that Paul White ratified the conduct of Clifton or was the final policymaker for the city on personnel matters. Thus, for the first time, the plaintiffs sought to premise Gainesville's liability on the actions of White, as well as Clifton. The defendants strenuously opposed the attempt.

This court held oral argument on September 17, 1993, to consider all of the pending motions except the motions for summary judgment. This order memorializes the oral ruling at the hearing.

The City's motions to dismiss or for summary judgment based upon Clifton's lack of policymaking authority remain pending in each case. As discussed next, the City's motions for summary judgment are GRANTED.

B. Discussion

The Supreme Court, in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), held that municipalities along with other bodies of local government are "persons" covered by 42 U.S.C. § 1983. Thus, they may be sued directly if a policy or custom of the municipality violates constitutional norms. However, *Monell* also rejected the use of *respondeat superior* in this context and confined liability to those cases where the injury was inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. *Monell*, however, involved the most straightforward instance of municipal liability, a written policy imposed by the governmental unit which required unconstitutional conduct on the part of officials. *Monell* left to its progeny the consideration of the myriad

potential sources of municipal liability which lie between a formal, written policy of the municipality on one end, and mere claims of *respondeat superior* on the other.

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), a divided Supreme Court set out some general principles governing when an act of an official can give rise to liability on the part of the municipality. Only those municipal officials who have "final policymaking authority" may by their conduct render the municipality liable under § 1983. Whether the official has "final policymaking authority" is answered by looking to state law. Thus, this question is not a typical question of fact. Instead, the court must determine whether the official is granted authority by legislative enactment or whether the authority is delegated to the official by another official who has authority to do so.

In *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Court clarified the "legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality itself to liability under 42 U.S.C. § 1983." *Praprotnik* involved allegations that the municipality's official policymaking authority (the City Commission) had delegated its policymaking authority to an official. The Court set out several principles to apply in this context. First, a municipality cannot insulate itself from liability by the mere expedient of delegating authority to a subordinate official:

> Relying on the language of § 1983, the court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and

> well settled as to constitute a custom or usage with the force of law.

Id. (internal quotes and cites omitted).

Second, "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* at 127. However, if the municipality's authorized policymakers retain authority to review the official's conduct and ratify the conduct, and the basis for it, the municipality is charged with this decision.

The *Praprotnik* court noted the limitations of the ratification theory however. "Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy." *Id.* at 130. Supervising officials are entitled to presume that subordinate officials are faithfully attempting to comply with municipal policy directives. Thus, simply approving an official's improper decisions will not subject the municipality to liability.

The *Praprotnik* court indicated that it would be a different matter if the decision of the subordinate official was cast in the form of a policy statement or if a series of decisions of a subordinate official manifested a "custom or usage" of the subordinate official of which the supervising official must have been aware. The Court was careful to note, however, that the mere failure to investigate the basis of a subordinate's decision does not amount to a delegation of policymaking authority.

C. **Application**

In the case at hand, the plaintiff has stipulated that "Defendant City of Gainesville, (hereafter City), is entitled to a partial summary judgment on the limited issue of whether local written or 'positive' law grants Defendant Chief Wayland Clifton (hereafter Clifton), final policy-making authority concerning personnel matters at the Gainesville Police Department. It does not." (*See, e.g.*, doc. 139 in *Griffin* case, p.2). Thus, the plaintiff is left with only the "custom or usage" approach.

The "custom or usage" moniker actually applies to two separate, but closely related, doctrines. First, a municipality may be held liable if its authorized policymakers themselves engage in a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage of the municipality. This doctrine is intended to prevent municipalities from escaping liability for an illegal policy merely by not putting it in writing. *Id.* at 127.

The second doctrine seeks to prevent a municipality's authorized policymakers from escaping liability for an illegal policy by simply delegating the authority to carry it out to a lower official. *Id.* at 130-131. The municipality will be liable, under a ratification doctrine, if its authorized policymakers consistently approved a series of decisions by a subordinate official which manifest an improper "custom or usage" of the subordinate official, of which the supervising authorized policymakers must have been aware.

The plaintiff relies upon the second doctrine in this case. The plaintiff alleges that Clifton made a series of decisions which manifested that Clifton engaged in a practice of retaliation that was so permanent and widespread that it amounted to a "custom or usage." That Clifton in fact engaged in an improper "custom or usage" is not enough to impose liability on the city, however. The supervisor must "realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official." *Id.* at 130. Allowing the city to be liable merely because of Clifton's consistent retaliation, if proven, would be indistinguishable from imposing *respondeat superior* on the City. In the cases at hand, the plaintiffs attempt to assert that White ratified the conduct of Clifton and thereby brought liability upon the City. This claim is subject to summary judgment for two reasons.

First, even if White did approve or ratify the conduct of Clifton, White was not the final policymaking authority for personnel decisions for the City of Gainesville. The City Commission was. As stated in *Praprotnick*, "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 126. The *Praprotnick* Court specifically rejected an approach which would have the court look beyond the express legislative enactment to determine the municipality's "actual power structure." In this case, the City Charter vests policymaking power for personnel decisions with the City Commission. (see Doc. 249 in *Hill*, Exhibit A). The City Commission has exercised this policymaking authority and has specifically protected whistleblowers. (see Doc.

249 in *Hill*, Exhibits D and E). Also, the City Commission specifically prohibited discrimination based on race, sex, marital status, etc. (see Doc. 249 in *Hill*, Exhibit C).

Thus, even if Clifton engaged in consistent retaliation and discrimination, such that White "must have known" of his custom or usage the acts of White would merely be discretionary acts of a subordinate official (subordinate to the City Commission) which are contrary to the stated policy of the municipality. The acts of White, even if provable, would not be the acts of the municipality.

Second, this court declined to allow this case to be transformed into a suit relying on White's conduct. Therefore, the record is bare of evidence indicating that White knowingly ratified improper conduct or that White must have known about the allegedly discriminatory custom or usage of Clifton. The plaintiff has not provided the factual predicate for municipal liability in this case.

In this case, the City Commission has enacted a policy which constrains the conduct of the only actual individual defendant, Clifton, and even the putative individual defendant, White. Thus, this case is simply one in which "an official's discretionary decisions are constrained by policies not of that official's making." In such a case, "those policies, rather than the subordinate's departures from them, are the act of the municipality." *Praprotnick*, 485 U.S. at 127. Accordingly, the City of Gainesville's motion for summary judgment are GRANTED.

II. MOTION FOR PARTIAL RECONSIDERATION . . . (THE *JOHNSON* CASE)

In the *Johnson* case, the Defendants moved to reconsider the June 24, 1993, order as it related to Johnson's First Amendment claim. Assuming the motion to reconsider is still pending, it is DENIED. First, the defendants support their motion by pointing to evidence which was completely available to them at the time of the initial motion. Nevertheless, the defendants do not attempt to explain why they did not point to this evidence earlier. Instead, the defendants merely attempt to make arguments they should have made in their original motion. The defendants even acknowledge that they should have made the arguments the first time. (doc. 79, p.2).

Second, on the merits, defendants' arguments do not support summary judgment. In the June 24, 1993, order, this court held that the statements of Mr. Johnson involved matters of public concern. Part of the court's reasoning was that Mr. Johnson filed grievances addressing his concerns. Also certain documents indicated that others discussed and complained about the conditions that Mr. Johnson complained about.

In the motion to reconsider, the defendants offer additional portions of an internal affairs memorandum and additional correspondence from other members of the department. The defendants assert that these show (1) that Johnson actually spread rumors rather than reporting the matter up the chain of command; and (2) that others did not in fact discuss and speculate about the relationship between Scott and Andrews.

This new information, however, does not show what the defendants assert it does. Rather it shows the opposite. The added portion of the I/A memo states that those interviewed had been discussing the affair between Scott and Andrews and were "evenly divided" as to whether the affair between Scott and Andrews would lead to bias. Also, the fact that Johnson discussed these matters with those of equal or lesser rank does not erase the fact that he did file a grievance with his superiors. Thus, taken as a whole, the new information does not justify departing from this court's earlier ruling. Accordingly, the motion for reconsideration is DENIED.

III. DEFENDANT CLIFTON'S MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY . . . (THE *HILL* and *GRIFFIN* CASES)

A. Introduction

Sylvia Hill and Raymond Griffin were officers in the Internal Affairs Division of the Gainesville Police Department (GPD). They each brought individual claims under 42 U.S.C. § 1983. In October of 1987, Hill interviewed for one of two captain vacancies that were open at the time. She did not receive the promotion; two white males filled the positions. On September 11, 1988, the death of one of the captains left a vacancy at the captain's slot. Hill interviewed for that position but was not promoted; a black male filled the position. On June 11, 1990, Hill was transferred to the Internal Affairs Section and assumed the duties of Unit Commander. She was not promoted to captain, however. In her second amended complaint, she alleges that males who had been Unit Commanders in the

Internal Affairs division had traditionally held the rank of captain. Next, at the time of the Gainesville student murders, another Lieutenant, Richard Ward, was selected to head the Gainesville component of the Gainesville student murders task force. As task force commander, he was promoted to acting captain, a temporary upgrade position.

Sylvia Hill filed a grievance, in which she complained that the earlier denials of promotion, and the selection of Ward over her, constituted gender-based discrimination. The grievance went to the City Manager and was denied. Seven months after filing the grievance, she was transferred from the Internal Affairs Unit to the Patrol Unit. The reasons given by Clifton were poor performance in Internal Affairs and that her attitude toward Clifton had deteriorated to the point that he doubted her loyalty and confidentiality.

At some point during their tenure with Internal Affairs, Hill and Griffin had begun a secret investigation of a group known as "Hallucinations 2000", with which they allege Clifton was associated in some way. Hill and Griffin claim that this group improperly controlled promotions and transfers within the GPD. Two weeks after she was transferred, defendant Clifton informed Hill that she was locked out of Internal Affairs. Clifton explained that he had authorized an audit/inspection of the Internal Affairs division. Hill claims that the audit/inspection explanation was merely a pretext for determining who had participated in the inquiry over Hallucinations 2000.

After the alleged lockout, Hill began discussing her situation with Larry Turner, a Gainesville attorney. Specifically, the question was raised as to whether she should approach the grand jury to testify concerning alleged wrongdoings by Hallucinations 2000. Apparently, Hill did contact the grand jury concerning Hallucinations 2000 and Clifton.

Shortly thereafter, Hill received notice that the entire Internal Affairs department was being investigated. As a result of the investigation, Hill was demoted to corporal. The stated reason was poor work performance. Hill alleges that the demotion was in fact due to her contact with the grand jury. She alleges that this violates her first amendment rights.

In short, Hill raises the following claims in her second amended complaint:

1. Gender-based discrimination in failing to promote her to captain in October 1987;

2. Gender-based discrimination in failing to promote her to captain in September 1988;

3. Gender-based discrimination in failing to promote her to captain and pay her as a captain after she was promoted to Unit Commander of the Internal Affairs division in 1990;

4. Gender-based discrimination in promoting Richard Ward as Gainesville Student Murders task force acting captain instead of her;

5. Violation of her First Amendment rights when she was transferred to Patrol division in March 1991, allegedly in retaliation for

her filing a sex-discrimination grievance; and

6. Violation of her First Amendment rights when she was demoted to corporal based upon the findings of an investigation into Internal Affairs which she alleges was selective discipline.

Hill filed this lawsuit against Wayland Clifton and The City of Gainesville. As discussed above, the City of Gainesville moved for summary judgment, arguing that the acts of Clifton do not subject the City of Gainesville to liability because Clifton did not possess final policymaking authority. Defendant Clifton also moved for summary judgment and argued that he is entitled to qualified immunity. For the reasons discussed below, Clifton's motion for summary judgment is GRANTED in part and DENIED in part.

After the internal affairs investigation, Griffin was also demoted to the rank of corporal, based on a finding of employee misconduct. The employee misconduct charges included willful and deliberate neglect, incompetency and inefficiency. Griffin claims this was in retaliation for his communications to the Grand Jury, in violation of the First Amendment. For the reasons given below, Clifton's motion for summary judgment with respect to Griffin is DENIED.

B. Analysis

1. Is Defendant Clifton Entitled to Qualified Immunity on Hill's and Griffin's First Amendment Claims?

It is clear beyond cavil that a governmental employer "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick,* 103 S.Ct. at 1687. On the other hand, "the [government's] interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' " *Id.* at 1686. (quoting *Pickering v. Board of Education,* 88 S.Ct. 1731 (1968)).

The interplay of these competing concerns has resulted in the application of a four-part test by the Eleventh Circuit. First, the plaintiff must show that her speech is protected by the First Amendment. This requires a showing that the employee's speech touches upon a matter of public concern. Next, the plaintiff must show that the speech was a substantial or motivating factor in the decision to take the action complained of. If these two factors are met, the burden shifts to the defendant. The defendant must show that the termination was justified by valid governmental interests, or that it would have occurred regardless of the specified speech. *Mt. Healthy v. Doyle,* 429 U.S. 274 (1977).

The threshhold [sic] question, therefore, is whether the employee was motivated by public concerns when she spoke, not purely personal concerns. The answer

must be determined "by the content, form, and context of a given statement, as revealed by the whole record." However, this is a question of law, not fact. *Connick*, 103 S.Ct. at 1690 n.7. Moreover, this is a threshhold [sic] question, which must be considered on its own before the employee's and employer's competing interests are weighed against each other. *Ferrara*, 781 F.2d at 1513.

In *Connick*, an Assistant District Attorney, dismayed by a proposed transfer, distributed questionnaires soliciting her co-workers views on several topics, including: (1) the office's transfer policy, (2) office morale, (3) the need for a grievance committee, (4) the level of confidence in supervisors, and (5) whether employees ever felt pressured to work on political campaigns. The Supreme Court felt that the first 4 questions touched only upon matters of personal concern. Since every government office necessarily deals with the public welfare, the Court was concerned with the result of an expansive ruling. If the meaning of "public concern" were taken to an extreme "every criticism directed at a public official . . . would plant the seed of a constitutional case." Thus, the court stated:

> While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Id. at 1691.

As for the fifth question, concerning whether employees felt pressure to work on political campaigns, the Court reached a different result. Stating that there is a

"demonstrated interest in this country that government service should depend upon meritorious performance rather than political service", the Court found that this question involved a matter of sufficient public interest. *Id.* Thus public employees should feel free to speak out concerning this topic without fear of retaliatory dismissal.

In *Ferrara,* the Eleventh Circuit held that a high school teacher's statements did not involve matters of public concern. Ferrara complained about (1) the school's use of collegiate registration, whereby students pick their own schedules and teachers; and (2) the school's practice of filling vacancies in the social studies department with physical education teachers and athletic coaches who were not necessarily certified to teach social studies. The plaintiff asserted that he made his statements because he was genuinely concerned with the quality of public education. The court focused, however, upon the context of the plaintiff's statements and ruled as a matter of law that his motivation in making the statement was not to speak on a matter of public concern but instead due to purely personal concerns.

For example, Ferrara conceded that he was concerned about collegiate registration because it undermined his ability to maintain control in the classroom. Also, he conceded that he made his comments about teacher placements after his attempt at obtaining a certain schedule was rejected. The court brushed aside the notion that issues of public education are *intrinsically* matters of public concern. Instead, the employee's motivation must be considered. In *Ferrara* the court held that the plaintiff made the statements based on personal concerns and

only secondarily attempted to transform them into issues of public concern. In other words, the court simply did not believe that he was primarily motivated by a concern for public welfare when making the comments.

Ferrara thus counsels that the employee's motivation in making certain statements must be considered. Also, in determining motivation, the statements must be considered in the context of the entire record. The case of *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), is particularly instructive. In *Morgan* a female employee complained about sexual harassment and was fired. The employee brought suit, alleging in part that she was retaliatorily discharged because of her statements, in violation of her First Amendment rights. The court rejected her argument that sexual harassment in a public workplace constituted a matter of public concern. The court stated

> While we heartily agree with Morgan that sexual harassment in the workplace is a matter of important social interest, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Id. at 754. (internal citations and quotation marks omitted). Instead, the court examined whether the purpose of Morgan's speech was to raise issues of public concern, or to further her own private interest. Because her comments centered on her own "entirely rational self-interest", the court held that her statements did not involve matters of public concern. *See also Pearson v. Macon Bibb County Hosp. Auth.*, 952 F.2d 1274, 1279 (11th Cir. 1992) (holding that the plaintiff's complaints pertained primarily to personal grievances and only incidentally touched on matters of public

concern); *Deremo v. Watkins*, 939 F.2d 908 (11th Cir. 1991) (holding that employee's request for compensation for remaining silent about sexual harassment did not constitute matter of public concern).

In *Deremo*, the employees themselves suffered sexual harassment and agreed to keep silent about it (allegedly after receiving a promise of compensation from Watkins, the supervisor of the harasser). When they later sent a letter to Watkins seeking compensation, he fired them. In that case, it simply strained credibility to argue that when they later sought compensation, they were motivated by the public welfare.

Likewise, in *Pearson*, the plaintiff, an operating room nurse, received an oral reprimand for neglect of duty for failing to notice and remove contaminated surgical equipment from the surgical area. Later, the plaintiff orally complained about the supervision she and other O.R. nurses received and wrote a written response to her oral reprimand. She was later fired. Like in *Deremo*, the plaintiff in *Pearson* made the comments after being embroiled in a personnel dispute. Her comments were in specific reply to the reprimand she received and her apparent concern for operating room cleanliness only arose after she received a reprimand. Thus, in making the statements she was primarily addressing personal concerns and was only secondarily interested in matters of public concern.

a. Hill's retaliation claims based on her gender discrimination grievance

The reasoning of these cases applies to a certain degree in this case. With regard to the transfer allegedly

in retaliation for her gender discrimination grievance, these cases compel a finding that her speech in making the grievance was not motivated by public concerns. The plaintiff only began speaking out about sexual discrimination (via the grievance) as a result of her being denied a promotion. When filing her grievance, she was motivated by her own perfectly reasonable self-interest. Like the plaintiff in *Ferrara* or *Morgan*, she only secondarily was concerned with public welfare. Thus, while sexual discrimination against her, if proven, might justify relief under some other theory, the First Amendment is not implicated by this claim.

b. Hill's and Griffin's retaliation claims based on their communications with the Grand Jury

Hill's and Griffin's First Amendment claims regarding retaliation for their communication to the Grand Jury are a different matter. Certain factors justify concluding that this speech was motivated by public, rather than purely personal, concerns. First, they attempted to make these statements public, although this would not have resulted in any direct benefit to them. While Hill's gender discrimination grievance, if granted, could have resulted in her gaining a captaincy, the grand jury proceedings would not have conferred any direct benefit to her. Second, the public's potential interest in the matter discussed should be considered. It is true that the public's potential interest in a matter is relevant to the employee-motivation issue only as it tends to show that the employee was indeed motivated by public concerns. However, here the potential public interest in allegations

of a corrupt clique controlling the police department contributes to the reasonableness of concluding that the plaintiffs were motivated by the public interest when contacting the grand jury. Therefore, this court finds that, in the context of the entire record, the plaintiffs were motivated by public concerns when they contacted the grand jury. Thus, plaintiffs have met the first prong of the four-part test.

As for the remaining prongs, the defendant is not entitled to summary judgment. First, if the plaintiffs were indeed demoted in retaliation for whistleblowing, the government's interest would not outweigh the plaintiffs' interest in exposing corruption in the GPD. For the remaining issues – (1) whether the speech was a substantial motivating factor in their demotion and (2) whether the government would have reached the same decision in the absence of the protected speech – the plaintiffs have provided sufficient factual assertions to raise a genuine issue of material facts with respect to them. Thus, Clifton's motions for summary judgment as they relate to this claim are DENIED.

In sum, the court rules as follows with respect to Clifton's motion for summary judgment on Hill's and Griffin's first amendment claims:

(1) Clifton's motion for summary judgment as it relates to Hill's first amendment claim based on retaliation against her for filling a gender discrimination grievance is GRANTED.

(2) Clifton's motions for summary judgment relating to Hill's and Griffin's first amendment claims based

on retaliation against them for contacting the grand jury are DENIED.

2. Is Clifton Entitled to Qualified Immunity on the Gender Discrimination claims?

a. The 1987 Captain Promotions

In 1987, two captain's positions opened up. Hill applied for and was not given either position. According to the undisputed testimony of Clifton, the two individuals who received the positions, Richard Squires and Norbert Thomas, each had greater supervisory experience in investigative police work. They also had been lieutenants longer than Hill, who had for years been serving in a non-supervisory position. Thus, the two white males who received the positions were objectively more qualified than Hill for the positions. Therefore, a reasonable chief in Clifton's shoes could have thought it proper to chose [sic] the two males over Hill. Clifton is entitled to qualified immunity on this claim.

b. The 1988 Captain Promotion

In 1988, one of the captain's positions opened back up due to the death of one of the captains. Although Hill again applied, Clifton chose Tony Jones, a black male. According to the plaintiff, Clifton expressly indicated that he would have chosen her but for the fact that Jones was an African-American and "the time was right" to promote an African-American to captain. Even if race were Clifton's sole motivation, it would not support Hill's gender-discrimination lawsuit. First, a reasonable chief in

Clifton's shoes could easily have thought it proper to promote Jones as part of an affirmative action program. Second, even if it were an improper reliance on race to promote him, this would support a reverse racial discrimination lawsuit, not a gender-discrimination lawsuit. Because a reasonable chief in Clifton's shoes could have thought his conduct proper, Clifton is entitled to qualified immunity with regards to the 1988 captaincy.

c. The 1990 Acting Captain Position

In 1990, in the wake of the grisly student murders, Clifton appointed Richard Ward as acting captain of the Gainesville component of the Gainesville student murders task force. Hill complained that she should have been given the temporary promotion. The undisputed evidence indicates, however, that Ward was a highly respected and experienced homicide investigator while Hill, the officer-in-charge of Internal Affairs, had little homicide experience. Given the urgency and public scrutiny surrounding solving the student murders, a reasonable chief in Clifton's shoes should easily have concluded that it was proper to promote Ward and not Hill to the acting captain's position. Therefore, Clifton is entitled to qualified immunity on this issue.

d. The Equal Pay Claim

In May of 1990, the plaintiff held the rank of executive lieutenant in a slot as personnel officer. However, the police department was restructured to create a new section called Professional Services. Within the section were

two units, one called Personnel & Recruitment and the other called Internal Affairs. In May of 1990, the plaintiff met with Chief Clifton to discuss a possible transfer into the Internal Affairs Unit, after this reorganization. She was to be the officer-in-charge of the Internal Affairs Unit.

Before the reorganization, Internal Affairs answered directly to the Chief. Apparently, when Internal Affairs answered directly to the Chief, its commander was always a captain. After the reorganization, however, Internal Affairs was merely a unit in the section called Professional Services, which was headed by a captain, Eugene Ross. Thus, when Hill was made officer-in-charge of Internal Affairs, she answered to Captain Ross, not directly to the chief. Also – according to the plaintiff herself – after the reorganization, her day to day activities and responsibilities did not increase. She was the officer-in-charge of Internal Affairs but was not the commander of Internal Affairs. She answered to Captain Ross, as did Carol Bishop, who was a sergeant and the officer-in-charge of Personnel & Recruitment.

Hill claims that she should have been made a captain when she was put in charge of Internal Affairs, because previous commanders of Internal Affairs were made captains. The old Internal Affairs was different from the new Internal Affairs, however. She therefore cannot argue that she was treated differently than those similarly situated. Instead, she freely admits that her job responsibilities did not change when she was transfered from the old personnel department to the new Internal Affairs Unit. Therefore, a reasonable chief in Clifton's shoes could easily have concluded that it was proper to continue paying her

according to a lieutenant's pay scale. Accordingly, Clifton is entitled to qualified immunity on this issue.

C. Conclusion for Clifton's motions for summary judgment

Clifton is entitled to summary judgment based on qualified immunity for all of Hill's claims, except for the First Amendment claim relating to alleged retaliation for contacting the grand jury. Further, Clifton is not entitled to summary judgment on Griffin's First Amendment Claim.

IV. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED:

1. The City of Gainesville's Motions for Summary Judgment are GRANTED.

2. The Defendants' Motion for Reconsideration in the *Johnson* case is DENIED.

3. As stated at the September 17, 1993, hearing, the plaintiff's motion to add Paul White and Motion to Amend the Complaint are DENIED.

4. Clifton's motion for summary judgment as it relates to Hill's first amendment claim based on retaliation against her for filing a gender discrimination grievance is GRANTED.

5. Clifton's motions for summary judgment relating to Hill's and Griffin's first amendment claims based on

retaliation against them for contacting the grand jury are DENIED.

6. Clifton's motion for summary judgment relating to Hill's claims of gender discrimination (failure to promote claim and equal pay claim) is GRANTED.

DONE AND ORDERED this 22nd day of August, 1994.

/s/ Maurice M Paul
MAURICE M. PAUL,
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GEORGE JOHNSON 91-10117,
SYLVIA HILL 91-10118,
RAYMOND GRIFFIN 91,10121, and
EUGENE ROSS 91-10145,

Plaintiffs,

v. CASE NO. [SEE ABOVE]

WAYLAND CLIFTON, and
THE CITY OF GAINESVILLE,

Defendants. (Filed Aug. 26, 1994)

_____/

ORDER

Oral argument was held on all pending motions in all of the cases on August 19, 1994. Defendant Clifton filed a motion for summary judgment asserting qualified immunity (doc. 161-1) in Plaintiff Ross's action. For the reasons stated below, Defendant Clifton's motion for summary judgment is DENIED.

BACKGROUND

Eugene Ross was an Inspector in the Internal Affairs Division of the Gainesville Police Department (GPD), and like his co-plaintiffs in this joined action brought an individual claim under 42 U.S.C. § 1983.

At some point during their tenure with Internal Affairs, Ross and his co-plaintiffs had begun a secret investigation of a group known as "Hallucinations 2000", with which they allege Clifton was associated in some way. Ross claims that this group improperly controlled promotions and transfers within the GPD. Shortly after Ross submitted information on "Hallucinations 2000" to Paul White, the City Manager, defendant Clifton informed Ross that he was locked out of Internal Affairs. Clifton explained that he had authorized an audit/inspection of the Internal Affairs division. Ross claims that the audit/inspection explanation was merely a pretext for determining who had participated in the inquiry over Hallucinations 2000.

After the alleged lockout, Ross began discussing his situation with Larry Turner, a Gainesville attorney. Specifically, the question was raised as to whether he should approach the grand jury to testify concerning alleged wrongdoings by Hallucinations 2000. Apparently, Ross did contact the grand jury concerning Hallucinations 2000 and Clifton.

Shortly thereafter, Ross received notice that the entire Internal Affairs department was being investigated. As a result of the investigation, Ross feared reprisals against himself and the other members of Internal Affairs, and therefore retired from GPD on September 1, 1991. Ross alleges that this forced retirement violated his First Amendment rights.

Ross filed this lawsuit against Wayland Clifton and the City of Gainesville. As noted in this Court's order of

August 22, 1994, the City of Gainesville moved for summary judgment, arguing that the acts of Clifton do not subject the City of Gainesville to liability because Clifton did not possess final policymaking authority. Defendant Clifton also moved for summary judgment and argued that he is entitled to qualified immunity. This Court granted the City of Gainesville's motion (doc. 166).

ANALYSIS

It is clear beyond cavil that a governmental employer "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick*, 103 S.Ct. at 1687. On the other hand, "the [government's] interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' " *Id.* at 1686. (quoting *Pickering v. Board of Education*, 88 S.Ct. 1731 (1968)).

The interplay of these competing concerns has resulted in the application of a four-part test by the Eleventh Circuit. First, the plaintiff must show that her speech is protected by the First Amendment. This requires a showing that the employee's speech touches upon a matter of public concern. Next, the plaintiff must show that the speech was a substantial or motivating factor in the decision to take the action complained of. If these two factors are met, the burden shifts to the defendant. The defendant must show that the termination was justified by valid governmental interests, or that it would

have occurred regardless of the specified speech. *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977).

The threshhold question, therefore, is whether the employee was motivated by public concerns when she spoke, not purely personal concerns. The answer must be determined "by the content, form, and context of a given statement, as revealed by the whole record." However, this is a question of law, not fact. *Connick*, 103 S.Ct. at 1690 n.7. Moreover, this is a threshhold [sic] question, which must be considered on its own before the employee's and employer's competing interests are weighed against each other. *Ferrara*, 781 F.2d at 1513.

In *Connick*, an Assistant District Attorney, dismayed by a proposed transfer, distributed questionnaires soliciting her co-wokers views on several topics, including: (1) the office's transfer policy, (2) office morale, (3) the need for a grievance committee, (4) the level of confidence in supervisors, and (5) whether employees ever felt pressured to work on political campaigns. The Supreme Court felt that the first 4 questions touched only upon matters of personal concern. Since every government office necessarily deals with the public welfare, the Court was concerned with the result of an expansive ruling. If the meaning of "public concern" were taken to an extreme "every criticism directed at a public official . . . would plant the seed of a constitutional case." Thus, the court stated:

> While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to

> be run as a roundtable for employee complaints over internal office affairs.

Id. at 1691.

As for the fifth question, concerning whether employees felt pressure to work on political campaigns, the Court reached a different result. Stating that there is a "demonstrated interest in this country that government service should depend upon meritorious performance rather than political service" the Court found that this question involved a matter of sufficient public interest. *Id.* Thus public employees should feel free to speak out concerning this topic without fear of retaliatory dismissal.

In *Ferrara*, the Eleventh Circuit held that a high school teacher's statements did not involve matters of public concern. Ferrara complained about (1) the school's use of collegiate registration, whereby students pick their own schedules and teachers; and (2) the school's practice of filling vacancies in the social studies department with physical education teachers and athletic coaches who were not necessarily certified to teach social studies. The plaintiff asserted that he made his statements because he was genuinely concerned with the quality of public education. The court focused, however, upon the context of the plaintiff's statements and ruled as a matter of law that his motivation in making the statement was not to speak on a matter of public concern but instead due to purely personal concerns.

For example, Ferrara conceded that he was concerned about collegiate registration because it undermined his ability to maintain control in the classroom.

Also, he conceded that he made his comments about teacher placements after his attempt at obtaining a certain schedule was rejected. The court brushed aside the notion that issues of public education are *intrinsically* matters of public concern. Instead, the employee's motivation must be considered. In *Ferrara* the court held that the plaintiff made the statements based on personal concerns and only secondarily attempted to transform them into issues of public concern. In other words, the court simply did not believe that he was primarily motivated by a concern for public welfare when making the comments.

Ferrara thus counsels that the employee's motivation in making certain statements must be considered. Also, in determining motivation, the statements must be considered in the context of the entire record. The case of *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), is particularly instructive. In *Morgan* a female employee complained about sexual harassment and was fired. The employee brought suit, alleging in part that she was retaliatorily discharged because of her statements, in violation of her First Amendment rights. The court rejected her argument that sexual harassment in a public workplace constituted a matter of public concern. The court stated

> While we heartily agree with Morgan that sexual harassment in the workplace is a matter of important social interest, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Id. at 754. (internal citations and quotation marks omitted). Instead, the court examined whether the purpose of Morgan's speech was to raise issues of public concern, or

to further her own private interest. Because her comments centered on her own "entirely rational self-interest", the court held that her statements did not involve matters of public concern. *See also Pearson v. Macon Bibb County Hosp. Auth.*, 952 F.2d 1274, 1279 (11th Cir. 1992) (holding that the plaintiff's complaints pertained primarily to personal grievances and only incidentally touched on matters of public concern); *Deremo v. Watkins*, 939 F.2d 908 (11th Cir. 1991) (holding that employee's request for compensation for remaining silent about sexual harassment did not constitute matter of public concern).

In *Deremo*, the employees themselves suffered sexual harassment and agreed to keep silent about it (allegedly after receiving a promise of compensation from Watkins, the supervisor of the harasser). When they later sent a letter to Watkins seeking compensation, he fired them. In that case, it simply strained credibility to argue that when they later sought compensation, they were motivated by the public welfare.

Likewise, in *Pearson*, the plaintiff, an operating room nurse, received an oral reprimand for neglect of duty for failing to notice and remove contaminated surgical equipment from the surgical area. Later, the plaintiff orally complained about the supervision she and other O.R. nurses received and wrote a written response to her oral reprimand. She was later fired. Like in *Deremo*, the plaintiff in *Pearson* made the comments after being embroiled in a personnel dispute. Her comments were in specific reply to the reprimand she received and her apparent concern for operating room cleanliness only arose after she received a reprimand. Thus, in making the statements

she was primarily addressing personal concerns and was only secondarily interested in matters of public concern.

Ross's First Amendment claim regarding retaliation for his communication to the Grand Jury raises certain factors that justify concluding that this speech was motivated by public, rather than purely personal, concerns. First, he attempted to make these statements public, although this would not have resulted in any direct benefit to him. Second, the public's potential interest in the matter discussed should be considered. It is true that the public's potential interest in a matter is relevant to the employee-motivation issue only as it tends to show that the employee was indeed motivated by public concerns. However, here the potential public interest in allegations of a corrupt clique controlling the police department contributes to the reasonableness of concluding that the Ross and his co-plaintiffs were motivated by the public interest when contacting the grand jury. Therefore, this Court finds that, in the context of the entire record, Ross was motivated by public concerns when he contacted the grand jury. Thus, Ross has met the first prong of the four-part test.

As for the remaining prongs, the Defendant is not entitled to summary judgment. First, if the Ross and his co-plaintiffs were indeed demoted in retaliation for whistleblowing, the government's interest would not outweigh the Plaintiffs' interest in exposing corruption in the GPD. For the remaining issues – (1) whether the speech was a substantial motivating factor in their demotion and (2) whether the government would have reached the same decision in the absence of the protected speech – Ross and his co-plaintiffs have provided sufficient factual

assertions to raise a genuine issue of material facts with respect to them. Thus, Clifton's motions for summary judgment as they relate to this claim are DENIED.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED:

Defendant Clifton's motion for summary judgment on the grounds of qualified immunity in Plaintiff Ross's action is therefore DENIED.

DONE AND ORDERED this 26th day of August, 1994.

/s/ Maurice M Paul
MAURICE M. PAUL,
CHIEF JUDGE

Supreme Court, U.S.
FILED
JUN 12 1996
CLERK

No. 95-1743

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SYLVIA HILL, RAYMOND GRIFFIN,
and EUGENE ROSS,

Petitioners,

v.

WAYLAND CLIFTON, JR.,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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26 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a public official asserting qualified immunity has a right to immediately appeal a district court's order denying summary judgment where the appeal involves the application of clearly established law to a given set of undisputed facts and does not implicate the existence or non-existence of a triable issue of fact.

PARTIES TO THE PROCEEDINGS

Petitioners, Sylvia Hill ("Hill") and Raymond Griffin ("Griffin"), are residents of Gainesville, Alachua County, Florida. Petitioner, Eugene Ross ("Ross"), is a resident of Ocala, Marion County, Florida.

Respondent, Wayland Clifton, Jr. ("Clifton"), is a resident of Gainesville, Alachua County, Florida.

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No. 95-1743

In The
Supreme Court of the United States
October Term, 1995

SYLVIA HILL, RAYMOND GRIFFIN,
and EUGENE ROSS,

Petitioners,

v.

WAYLAND CLIFTON, JR.

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Wayland Clifton, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Sylvia Hill, Raymond Griffin and Eugene Ross.

OPINIONS BELOW

On January 26, 1996, the United States Court of Appeals for the Eleventh Circuit reversed the Orders of the United States District Court for the Northern District of Florida denying Wayland Clifton, Jr. qualified immunity and remanded the cause with instructions to enter summary judgment in favor of Clifton on his qualified immunity defense. The Court's opinion is reported at 74 F.3d 1087 (11th Cir. 1996) and is reproduced in the Appendix to Petitioners' Petition for Certiorari. (Pet.App. 1a-12a).

The Orders of the United States District Court for the Northern District of Florida denying in part Wayland Clifton, Jr.'s Motions for Summary Judgment are unpublished; however, the Orders are reproduced in the Appendix to Petitioners' Petition for Certiorari. (Pet.App. 13a-46a).

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the United States Court of Appeals for the Eleventh Circuit was invoked as an exception to 28 U.S.C.§1291 based on Mitchell v. Forsyth, 472 U.S. 511, 527-29 (1985) and Courson v. McMillian, 939 F.2d 1479, 1486 (11th Cir. 1991) as an appeal of an order denying Wayland Clifton, Jr. summary judgment based on qualified immunity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., amend. I:

> Congress shall make no law ... abridging the freedom of speech....

U.S. CONST., amend. XIV, §1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. §1291:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ....

42 U.S.C. §1983:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I.

Factual Background [1] and [2]

Hill, Griffin and Ross were police officers employed by the City of Gainesville, Florida police department and served together in the Internal Affairs section ("IA"). (Pet.App. 3a).

In the fall of 1990, Clifton began to notice that the work product in IA was deteriorating and he counseled Hill, Griffin and Ross about his concerns. (Pet.App. 8a and 23a; RH6-294, Clifton Dep. Vol. II at 94-7, Vol. IV at 196-7, Tab 2).

In February 1991, Hill found out that Clifton intended to transfer her out of IA because her poor job

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[1] Only those facts which are undisputed for appellate purposes are recited.

[2] Clifton's motions for summary judgment were filed in the district court together with a statement of material facts and a two-volume appendix containing record excerpts. These papers are combined in the record on appeal No. 94-3184 as R6-294, No. 94-3179 as R2-165 and No. 94-3180 as R2-161. References to the appendix will appear in Clifton's brief as "RH6-294, ____ Dep. Vol. ___ at page ___, Tab ___; RG2-165, ___ Dep. Vol. ___ at page ___, Tab ___' or RR 2-161, ___ Dep. Vol. ___ at page ___, Tab ___".

performance and animosity toward him had caused him to lose confidence in her loyalty and confidentiality. (Pet.App. 4a and 8a; RH-294, Clifton Dep. Vol. II at 118-20, Tab 2; Hill Dep. Vol. I at 7, Vol. VI at 973-4, Tab 5).

Immediately after learning that Clifton intended to replace her in IA, Hill, with Ross' approval, assigned Griffin to investigate allegations of misconduct (manipulating promotions) by a group of police officers calling themselves "Hallucinations 2000" and to see if Clifton might be involved. (Pet.App. 3a; RH6-294, Ross Dep. Vol. II at 186-91, Tab 10; Vol. III at 226-31, Tab 10).

After Hill had been officially transferred out of IA (early April 1991), Clifton, in consultation with the city manager, responded to reports of mismanagement in IA by ordering an investigative performance audit of the unit. (Pet.App. 8a; RH6-294, Clifton Dep. Vol. II at 101-3, Tab 2; White Dep. Vol. I at 11-36, Tab 15). Hill, Griffin and Ross knew that they were under investigation and all three were denied access to IA. (Pet.App. 4a and 8a; RH6-294, Clifton Dep. Vol. II at 101-3, Tab 2; White Dep. Vol. I at 11-36, Tab 15).

The internal investigative audit of IA was finalized on June 3, 1991 and uncovered gross mismanagement of that unit during the time frame that Hill, Ross and Griffin were running it. (Pet.App. 4a and 5a; RH6-294, Scott Dep. Vol. I at 44-6, Tab II; Terry Dep. Vol. I at 52, Vol. II at 6-7, 43, 46, 52, 69-70, Tab 12; Exhibit 217, Tab 24).

In July 1991, Clifton offered to transfer Hill, Griffin and Ross to any position within the police department, except IA, with no loss of pay, rank or benefits. (Pet.App. 3a, 4a and 9a, n.2; RH6-312, Turner Dep. Vol. I at 117,

Tab 13). However, knowing that they were under investigation and that their own job security depended on discrediting Clifton, Hill, Griffin and Ross rejected this proposal and went to the grand jury anyway with their accusations about "Hallucinations 2000". (Pet.App. 4a, 9a, n.2, 11a; RH6-312, Turner Dep. Vol. I at 117-18, 120, Tab 13).

After Hill, Griffin and Ross went to the grand jury, the audit findings were reviewed and employee misconduct charges were filed against them in August 1991. (Pet.App. 4a; RH6-294, Clifton Dep. vol. IV at 6-9, Tab 2; Scott Dep. Vol. II at 9-10, Tab 11).

II.

Procedural Background.

Hill, Griffin and Ross each brought separate lawsuits against the City of Gainesville ("City") and Clifton alleging that they had been disciplined in retaliation for communicating with the grand jury. The District Court granted summary judgment to the City on all charges. It also entered summary judgment for Clifton under qualified immunity on all causes of action except the Petitioners' First Amendment retaliation claims based on their contact with the grand jury. Clifton immediately appealed the denial of qualified immunity on the grounds that the undisputed given facts of the case did not show a violation of clearly established law.[3]

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[3] Clifton's summary judgment motion was not premised on the lack of evidence establishing that protected speech motivated him to take disciplinary action against the Petitioners. Likewise, Clifton did not argue that he was entitled to qualified immunity because of evidence

The United States Court of Appeals for the Eleventh Circuit accepted jurisdiction of Clifton's appeal on the basis that the appealable issue was a purely legal one, i.e., whether the undisputed facts of the case supported a claim that Clifton violated clearly established law. The Petitioners now challenge the authority of the Court of Appeals to immediately review the District Court's denial of qualified immunity to Clifton.

SUMMARY OF ARGUMENT

This Court should refuse to grant review of the petition for the following reasons:

1) The District Court's Order denying Clifton's motion for summary judgment is immediately appealable because a) Clifton is a public official asserting qualified immunity, and b) the issue appealed involves whether or not certain given undisputed facts show a violation of "clearly established" law.

2) The dispute underlying the Clifton appeal concerns the application of clearly established law to a given set of undisputed facts. It does not implicate the existence or non-existence of a triable issue of fact, i.e., facts the litigants might or might not be able to prove after trial, but, rather whether Clifton, in light

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showing he would have made the same decision in the absence of protected speech. However, the District Court erroneously injected those factual issues into its qualified immunity analysis.

On appeal Clifton preserved his objections to that part of the District Court's orders, but pointed out that he could not immediately appeal the denial of qualified immunity on that basis.

of the undisputed facts known to him at the time, violated clearly established law when he disciplined the Petitioners.

3) Clifton's right to immediately appeal the denial of his qualified immunity defense is not barred because the District Court's Order was based on a finding that there are issues of fact for trial on the merits of the Petitioners' constitutional tort claim. The factual uncertainties cited by the District Court are only relevant to the merits of the Petitioners' underlying retaliation claim and have no bearing or effect on Clifton's right to qualified immunity.

4) The Court of Appeals followed the jurisdictional guidelines set by this Court in Johnson v. Jones, 115 S.Ct. 2151 (1995), for immediate review of a trial court's denial of qualified immunity.

Accordingly, the Petition for Writ of Certiorari filed by the Petitioners should be denied.

ARGUMENT FOR DENYING THE WRIT

Qualified immunity protects government officials performing discretionary functions from civil trials and liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In other words, an official carrying out discretionary duties is entitled to qualified immunity if either 1) the law was not clearly established or 2) the official reasonably could have believed his (her) actions were consistent with established law. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The Petitioners do not challenge whether Clifton is entitled to qualified immunity, but, rather, whether he is entitled to immediate appellate review of the District Court's Order denying his motion for summary judgment based on that defense. The heart of the Petitioners' argument is that this Court's decision in Johnson v. Jones, supra, bars immediate appellate review because the trial court found genuine issues of material fact on the merits of their underlying constitutional tort claim. Hill, Griffin and Ross contend that Johnson precludes an appellate court from reviewing whether a public official violated clearly established law under any given set of facts, even those which are not in dispute or have no bearing or effect on the official's right to qualified immunity. However, the Petitioners are wrong - the jurisdictional guidelines established in Johnson clearly authorize an appellate court to review a given set of undisputed facts and to decide whether under those facts the official violated clearly established law. Johnson, 115 S.Ct. at 2158-2159. And, this is precisely what the Eleventh Circuit Court of Appeals did when it accepted jurisdiction of Clifton's interlocutory appeal and reversed the District Court with instructions to enter summary judgment in favor of Clifton on his qualified immunity defense. Behrens v. Pelletier, 116 S.Ct. 834 (1996).

I.

A district court's order denying a defendant's motion for summary judgment is immediately appealable as a "collateral order" (i.e., a final decision) where (1) the defendant is a public official asserting a defense of "qualified immunity," and (2) the issue appealed concerns, not which facts the parties might be able to prove, but, rather, whether or not certain given facts show a violation of "clearly

established" law. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Johnson, 115 S.Ct. at 2155.

The "relevant question" for qualified immunity purposes in First Amendment retaliation cases is not whether the right of government employees to be free from retaliatory discipline for protective speech is clearly established, but, rather, whether a reasonable public official could have believed that the discipline was lawful in light of clearly established law and the information the moving party possessed at the time he (she) acted. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Thus, the qualified immunity standard not only requires courts of appeals to examine what law is clearly established, it also mandates that they examine the information possessed by government officials accused of violating that law. Anderson, 483 U.S. at 641. In essence, then, the legal question of qualified immunity is itself fact-intensive where the party asserting that defense asks the court of appeals to examine a given set of undisputed facts that were known to him (her) in order to determine whether he (she) violated clearly established law by his (her) actions. And, Johnson unequivocally allows immediate appellate review in such instances even though they involve a fact-intensive inquiry. Johnson, 115 S.Ct. at 2159.

II.

Johnson does not preclude Clifton's appeal. Johnson holds that a defendant, entitled to invoke a qualified immunity defense, may not immediately appeal a district court's order denying that defense where the defendant's immunity from suit depends on a resolution of conflicting factual assertions, or even on determining whether there is a contestable factual question material to the defense of

immunity. Johnson, 115 S.Ct. at 2159. Johnson does not, however, preclude an appellate court from reviewing whether a public official violated clearly established law under a given set of facts which are not disputed. On the contrary, Johnson permits immediate review of the rejection of a qualified immunity defense when the issue appealed does not focus on what facts the litigants might (or might not) be able to prove after trial, but, instead involves whether a given set of facts shows a violation of clearly established law. Id. at 2158-2159.

In Johnson, the defendant did not appeal the issue of whether his conduct under a given set of undisputed facts violated clearly established law, but merely argued that the trial court's denial of qualified immunity was erroneous because there was no record evidence proving he had engaged in any conduct which supported the plaintiff's allegations of a constitutional violation. Id. at 2154. Clifton, on the other hand, asked the Court of Appeals to 1) examine a given set of facts known to him which Hill, Griffin and Ross did not dispute and 2) to decide whether under those facts he violated clearly established law. And, under the precedent of Harlow, Mitchell, Anderson and Johnson, the Court of Appeals was required to accept jurisdiction and address those arguments. Behrens, 116 S.Ct. at 841.

III.

The Petitioners contend that the Court of Appeals did not have jurisdiction to hear Clifton's interlocutory appeal because the District Court's Order denying qualified immunity was based on a finding that there were issues of fact for trial on the merits of their constitutional tort claim. They argue that the reasons given by the District Court in its

order for denying Clifton qualified immunity automatically and conclusively foreclose any interlocutory appeal. According to the Petitioners, the mere wording or phrasing of the District Court's Order divests an appellate court of jurisdiction to review whether a public official violated clearly established law under any set of facts. However, under close scrutiny, the Petitioners' rationale is bogus and does not accurately reflect what this Court said in Johnson.

In Behrens, the respondent, relying on Johnson, asserted that appeal of denial of a summary judgment based on qualified immunity was not available because the denial rested on the ground that "[m]aterial issues of fact remain". However, in response this Court observed:

> That is a misreading of the case. Every denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and Johnson surely does not mean that every denial of summary judgment is nonappealable. Johnson held, simply that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under Cohen and Mitchell. Johnson reaffirmed that summary-judgment determinations are appealable when they

> resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity -- typically the issue whether the federal right allegedly infringed was "clearly established."

Behrens, 116 S.Ct. at 841 (citations omitted).

> Johnson permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the Harlow standard of "objective legal reasonableness." And while the District Court, in denying petitioner's summary-judgment motion, did not identify the particular charged conduct that it deemed adequately supported, Johnson recognizes that under such circumstances "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."

Behrens, 116 S.Ct. at 842 (citations omitted).

Johnson tells us that a defendant's right to immediately appeal the denial of qualified immunity is not controlled by the wording or phrasing of the district court's order. If it were otherwise, a defendant would have no immediate recourse to avoid trial and liability, notwithstanding that the district court mistakenly identified clearly established law, incorrectly applied clearly established law to the facts it found and/or assumed facts which, even when viewed in the light most favorable to the plaintiff, were not

supported by the record. In short, qualified immunity would be a nullity. Johnson, 115 S.Ct. at 2159.

Whenever, as in this case, a district court's decision denying qualified immunity is challenged on the grounds that the court mistakenly identified clearly established law, the appeals court has to know what set of facts to assume before it answers the purely legal question ("clearly established" law) underlying the qualified immunity defense. If the district court properly identifies those facts in its order, the court of appeals can simply adopt them. However, where the district court denies summary judgment without stating its reasons or alludes to factual uncertainties which are relevant only to a party's underlying tort claim and have no bearing or effect on a defendant's right to qualified immunity, the appellate court is entitled to review the record to determine for itself what facts the trial court likely relied on. In either case, an appeals court may conduct its own evidence based examination of the record in order to determine whether under a given set of undisputed facts the defendant violated clearly established law. Id. at 2159; see also Anderson, 483 U.S. at 641; Behrens, 116 S.Ct. at 842.

In this case, Clifton attacked the District Court's Order denying him qualified immunity because the Court mistakenly identified clearly established law, i.e., the Court's analysis of his qualified immunity defense was fatally flawed because the Court 1) incorrectly applied the clearly established law to the facts it found, 2) assumed other facts which were not supported by the record even when viewed in the light most favorable to the Petitioners, 3) failed to address the core issue of the defense, i.e., whether Clifton reasonably could discipline the Petitioners based on the facts as he knew them to be and 4) failed to state the

facts it assumed when it denied summary judgment based on pre-existing "clearly established" law.

IV.

Here the District Court failed to determine or even address the core legal issue of Clifton's qualified immunity defense, i.e., could a reasonable public official have believed Clifton's conduct was lawful based on "clearly established" law? The Court did (albeit erroneously) analyze the preliminary issue of whether the Petitioners' claim even involved or implicated a federally protected right, i.e., whether the Petitioners' speech invoked the protection of the First Amendment. Rankin v. McPherson, 483 U.S. 378, 384 (1987); Siegert v. Gilley, 500 U.S. 226 (1991); Waters v. Churchill, 114 S.Ct. 1878, 1884 (1994). But, then the Court stopped and never applied the objective-reasonableness test to the undisputed facts of the case to determine whether Clifton, based on what he knew, reasonably could have believed that disciplining the Petitioners did not violate clearly established law. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). Moreover, the District Court did not identify any facts which supposedly violated "clearly established" law. (Pet.App. 13a-37a).

Instead, the Court went off on a tangent and denied Clifton qualified immunity because of disputed facts relating to whether the Petitioners' protected speech was a substantial motivating factor behind Clifton's decision to discipline them and whether Clifton would have reached the same decision in the absence of that speech. Neither of these issues is relevant to or has any bearing or effect on Clifton's right to

qualified immunity[4] - they are merely two elements of the four-part test adopted by the Eleventh Circuit to determine whether a public employee has been retaliated against because of his (her) speech. Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989). Furthermore, the Court failed to even list the facts relating to those issues which it had assumed and relied on.

V.

Following the guidelines of Johnson,[5] the Court of Appeals accepted jurisdiction of Clifton's appeal and conducted its own review of the record to determine what facts the District Court, in the light most favorable to the Petitioners, should have assumed had it addressed the issue of whether Clifton reasonably could have believed that he could discipline the Petitioners based on the facts as he knew

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[4] The subjective intent of the government actor is not material to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 815-18 (1982).

[5] The Eleventh Circuit has consistently adhered to the jurisdictional guidelines announced by this Court in Johnson v. Jones. See Prosser v. Ross, 70 F.3d 1005 (11th Cir. 1995); Heggs v. Grant, 73 F.3d 317 (11th Cir. 1996) (appeals court may review whether clearly established law was violated under given set of facts); Suissa v. Fulton County, Georgia, 74 F.3d 266 (11th Cir. 1996); Haney v. Cumming, 69 F.3d 1098 (11th Cir. 1995); Ratliff v. DeKalb, Georgia, 62 F.3d 338 (11th Cir. 1995) (whether facts showed that defendants discriminated against the plaintiff not subject to interlocutory appeal); Mastroianni v. Bowers, 74 F.3d 236 (11th Cir. 1996) (disputed issue regarding conduct alleged to have violated clearly established law; court has no interlocutory jurisdiction to review).

them to be.[6] After determining what those undisputed facts were, the Court of Appeals analyzed pre-existing "clearly established" law and concluded that there were no cases which might have told Clifton 1) that the Petitioners' grand jury testimony was a matter of public concern rather than personal gain or 2) that he could not take disciplinary action against the Petitioners based on an investigation initiated before he even knew about the Petitioners' alleged protected speech to the grand jury. Accordingly, the Court correctly held that Clifton's conduct did not violate "clearly established" law and that he is entitled to the protection afforded by qualified immunity.

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[6] Contrary to the representation made by the Petitioners at page 15 of their petition, the Eleventh Circuit's decision in this case is not in conflict "with virtually every court of appeals' interpretation of Johnson v. Jones". See Stella v. Kelley, 63 F.3d 71 (1st Cir.1995); Blue v. Koren, 72 F.3d 1075 (2d Cir. 1995); Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995); Jackson v. City of Atlanta, Texas, 73 F.3d 60 (5th Cir. 1996); Christophel v. Kukulinsky, 61 F.3d 479 (6th Cir. 1995); Sanderfer v. Nichols, 62 F.3d 151 (6th Cir. 1995); Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995); Reece v. Groose, 60 F.3d 487 (8th Cir. 1995).

CONCLUSION

Respondent respectfully submits that the Court of Appeals had jurisdiction to accept an immediate appeal of the District Court's Orders denying his motions for summary judgment based on qualified immunity. The Petition for Writ of Certiorari filed by the Petitioners should, therefore, be denied.

Respectfully submitted,

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